Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

February Term, 1980

No 79-1291

STANLEY V. TUCKER,

Petitioner

-v-

JEAN NEAL, ROBERT R. ANDERSON,
and ANDERSON & ANDERSON

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE HONORABLE SECOND CIRCUIT COURT
OF APPEALS

STANLEY V. TUCKER
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PETITION FOR A WRIT OF CERTIORARI TO
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The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Second Circuit Court of Appeals entered December 27th, 1979, Infra Appendix "G"

CITATION TO OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is unreported and prin.ted in the Appendix Infra "G"

JURISDICTION

The Jurisdiction of this Court to review the decision of the 2nd Circuit Court of Appeals is conferred by 28 USC 1254 (1).

QUESTIONS PRESENTED

Whether actions dismissed under Rule 12 for "failure to state a claim" can be "res judicata" over later actions that are held to "state a claim"

Does Rule 41b governing dismissals with a trial govern dismissals under Rule 12?

Is"res judicata" applicable in an action stayed by court order while other unrelated actions litigated between the parties?

Does the infliction of "continuing damages" bytort-feasor respondents bar "res judicata" via claims litigated years earlier in differer time periods?

MAJOR QUESTION FOR REVIEW

The Honorable Second Circuit Court of Appeals has decided important questions of federal law in a way that is in conflict with the decisions of This Honorable Court and in conflict with decisions of other Circuit Courts of Appeal.

STATUTORY PROVISIONS INVOLVED

This action involves dismissals for "failure to state a claim" under Rule 12 FRCP and the application of Rule 41 b to Rule 12 dismissals

FRCP Rule 12 b "The following defenses may be made by motion:

(6) Failure to state a claim upon which relief may be granted"

FRCP Rule 41 b "Involuntary Dismissal: Effect thereof.

"After plaintiff in an action tried by court without jury has completed the presentation of evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the grounds ... the plaintiff has shown no grounds for relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction.... operates as an adjudication upon the merits"

STATEMENT OF THE CASE

This Petitioner has for over a decade been harrassed by Respondents who filed approximately 14 liens upon real property of Petitioner when only one sufficient to provide security for claimed debt. Liens filed in 1972, 1973 and 1974. Petitioner has been subjected to damages slowly starting in 1973 and rapidly increasing in 1975, 1976, 1977, 1978, 1979 and 1980 as the continuing inflation and disappearance of mortgage moneys caused incredible financial losses due to inability to mortgage or sell when conditions good due to excessive liens. Under repeated demands to make releases the Respondents announced their purpose - "to cause your financial ruin.... to bring about a Halocaust of Foreclosures"

In October 1973 Petitioner filed this action in the state courts in two counts to discharge excessive liens under GS 49-50 and for damages for Abuse of Process.

Respondents immediately removed to federal court based upon diversity of citizenship (at that time all respondents ciizens of California) and obtained a *Stay Order that despite repeated motions to terminate stay, all denied, remained in effect until April 1977.

This action was assigned for trial upon a complaint amended to federal form and procedure in July 1979 at which time the Respondents filed a Motion for Summary Judgment claiming actions filed and terminated earlier for "failure to state a claim" under Rule 12 b were "res judicata" under Rule 41 b.

The res judicata motion was granted by District Court, appeal taken to 2nd Circuit Court of Appeals and upheld in December 1979

SUMMMARY OF ARGUMENT

The Plaintiff/Petitioner's actions withstood a "Motion to Dismiss" in Trial Court with holding that a valid claim was stated.

The earlier dismissals for "failure to state a claim" are not "res judicata" as to this action where a "valid claim is stated"

One of the actions dismissed for"failure to state a claim" was later re-litigated between different parties in the state courts and the Connecticut State Court upheld the claim holding the offensive state statute unconstitutional.

*See Appendix "D"

"Continuing damages" tort theory holding each instance of damages sufferred to be a new "tort" bars use of res judicata in 1976-1980 based on a judgment rendered in 1974 or 1975.

ARGUMENT

I. THE SECOND CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THIS COURTs DECISIONS INTERPRETING RULE 41 b

Recent decisions of this Honorable Court make clear that a Rule 41b dismissal without a statement "with prejudice" is in fact without prejudice to a new filing that adequately states a claim.

Costello v United States
365 US 263

"failure of District Court to specify dismissal was "without prejudice" did not bar the second proceeding"

United States v Lucchese
365 US 290

"District Court did not specify that dismissal was "without prejudice

Held: Under Rule 41b FRCP such a form of dismissal did not bar a new proceeding"

The District Courts application of Rule 41 b bar upheld by 2nd C.A. is without precident and contrary to the two decisions cited above.

The Costello, supra, and Lucchese, action both were dismissals for failure to state a claim in the sense that a vital "affidavit of good cause" was lacking. This court held such a lack to be a "jurisdictional lack" within the meaning of Rule 41 b.

Thus it is argued that "failure to state a claim" is a subject matter jurisdictional defect that can be cured by a later action that adequately states an action just as the District Court in this action so held.

Costello P 266 ""dismissal ... for failure to file affidavit of good cause was a dismissal "for lack of jurisdiction" within the meaning of Rule 41 b"

While the earlier actions upon which res judicata was based were for civil rights claims, See Appendix "A", "B", and "C". No attempt was made in any of the earlier actions to state a claim under GS 49-50, such as was stated herein. Petitioner argues that in light of the Stay Order in this action from January 1974 to April 1977 and in light of no attempt to plead the claims in this action in any earlier action that no res judicataeffect could result.

Starr v Gorski
378 F Supp 193
USDC-WD PENN.
1974

"Layman, pro se, attempted in prior action to state civil rights claim dismissed for failure to state a claim not barred in malpractice claim by res judicata"

II. THE SECOND CIRCUIT COURT OF APPEALS DECISION IS CONTRARY TO STATE LAW AS INTERPRETED BY THE CONNECTICUT SUP. COURT ON "CONTINUING DAMAGES"

The Connecticut Supreme Court in its decisions long ago followed the tort theroy believed followed in all the states that a "tort takes place each time damages are suffered" Thus under this theory an injury in 1973 is a separate tort from an injury suffered in 1976 or 1977 or 1978 or 1978 or in 1980. Thus each instance of tort inflicted damages suffered is a separate tort and may be separately sued or under "continuing tort" theory all damages may be sued out in one lawsuit.

Bank of Hartford v Waterman, Sheriff
26 Conn 323 1857

> "When an act is not legally injurious until certain consequences take place the period of limitations takes place from the consequential injuries"

Sheriff Waterman recorded the lien on wrong property from the writ and years went by the Connecticut Supreme Court held no tort took place until injuries were suffered when discovery took place.

As a matter of state law it is settled in Connecticut that the maintaining of excessive liens is actionable for damages.

Byrne v Kelsey
61 Atlantic 965 1905

> "The court rendered judgment that plaintiff recover damages"

The Byrne, supra, action is the only reported case where damages were awarded for maintaining of excessive liens.

III THE SECOND CIRCUIT COURT OF APPEALS DECISION IS CONTRARY TO THIS COURT's DECISIONS ON "CONTINUING DAMAGES"

This Court's decisions on "continuing damages follow the same policy expressed in 1857 by the Connecticut Supreme Court in Bank of Hartford, supra, to effect that the sustaining of damages constitues new actionable tort that can be sued in one action under continuing tort theory and is not barred by "res judicata" by dismissal or even settlement or payment of prior claims.

Lawlor v National Screen
349 US 322 1954

> "Whether defendants conduct be regarded as a series of individual to torts or as one continuing tort, the 1943 judgment does not bar the 1949 suit"

In Lawlor, supra, the 1943 suit ended in a settlement and dismissal"with prejudice" But damages claimed in 1949 suit came later in time. Thus this Petitioner claims that in this action damages suffered in 1976, 1977, 1978,1979 and 1980 are not barred by judgments in other suits in 1974 and 1975

The principle that for res judicata to apply not only the parties but the issues must be the same was clearly explained by this Honorable Court but forgotten by the Second Circuit Court of Appeals in ruling in this action.

Preiser v Rodrigues
411 US 475

"The general rule of res judicata applies to repetitious suits involving the same cause of action"

For other cases demonstrating the difference between repeating the same claim and suing on a right which accrued subsequently out of the same basic situation see:

Cromwell v Sac County
94 US 351

Southern Pacific R Co v US
168 US 1, 48

U. S. v Maser
266 US 236, 242

Tait v Western Md R Co
289 US 620, 623

Commissioner of Internal Revenue v Sunnen
333 US 591 1973

"The general rule of res judicata applies to tax proceedings involving same year and same claim. Each tax year gives rise to a new cause of action - a judgment on the merits is res judicata as to any subsequent proceedings involving the same claim and same tax year"

The pertinent state law as explained by the Connecticut Supreme Court in Bank of Hartford, supra, is still the same and is still consistent with all the decisions relevant by This Honorable Court.

C.L & P v Tax Commissioner
169 Conn 62

"A second litigation over later tax years not barred by prior litigation over earlier tax years"

The latest decision in this consistent series upholding the right to sue a second time for different causes of actions is -

Sea Land Services Inc v Gudet Adminis.
414 US 573 1974

"Action terminated for unseaworthiness is not res judicata for later action for maritime death because respondents suit is for a different cause of action"

That totally different civil rights issues were litigated, different claims of law, from the GS 49-50 excessive lien claim litigated herein means res judicata does not apply.

United States v Moser
266 US 236 1924

"The doctrine of res judicta does not apply to unmixed questions of law... The court below practically assumed there was a legal presumption that every issue in law had been tried in the first Moser case. Yet the court twice declared the statute never was considered - the contradiction is evident."

The same contradiction appears in the record in this action - the trial court assumed the same issues of law were tried in earlier cases but they were not at issue by the pleadings.

More important, all all times since January 1974 to date this Petitioner believed that the Stay Order entered in this action 197 , App "D",and terminated April 1977 barred any attempt to re-plead this GS 49-50 excessive lien action in any of the other actions.

Goodcell v Graham
35 F 2d 566

"Stay means to suspend progress of judicial proceedings"

Wallace v Wallace
13 Wis 224

"An order staying proceedings ends all progress and prevents the taking of any further steps in the action during the continuance of the Stay"

IV. THE SECOND CIRCUIT COURT OF APPEALS DECISION IS CONTRARY TO DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

Crowe v Leek
550 F 2d 184 1977
4th C.A.

"Dismissal of earlier prisoners class action did not bar later prisoners class action on grounds of res judicata where the second case raised matters different from first case & covered a time period after first case. "

The decision in H-8 the first action involved only Jean Neal and her liens less than a third of the liens at issue in this action and was disposed of by motion for summary judgment.

Old Grantian v Grant
361 F 2d 1018 1966
Court of Claims

"Motion for Summary Judgment of no res judicata effect"

The decisions in the two following cases, civil rights actions, were both dismissed under Rule 12 for "failure to state a claim" and both dismissals were without a statment either "with prejudice" or "without prejudice"

Sachs v Ohio Nat Life Ins
148 F 2d 128
7 th CA

"A ruling made in a case dismissed is not res judicata

Greenlee v Goodyear Tire
572 F 2d 273
10th CA

"Where prior suit based on same cause of action was dismissed upon motion of plaintiff and notice of dismissal did not state it was with prejudice dismissal without prejudice and second suit not barred by Res Judicata"

V. THE THIRD CIVIL RIGHTS ACTION RELIED ON FOR RES JUDICATA H75-310 WAS REVERSED BY CONN. SUPREME COURT

Chestnut Estates v Society for Savings
Conn Law Journal Vol XL No 32 2-6-79

> "We now decide GS 49-14 is unconstitutional because it does not comply with the procedural due process of law requirements of the 14th Amendment"

This decision is a complete reversal of the District Court decision in H75-310 challenging on civil rights grounds the constitutionality of GS 49-14.

Perkins v Benguet
132 P 2d 70

> "As between conflicting judgments of different jurisdictions the last in pointof time controls.

CONCLUSION

This Honorable Court should summarilly vacate and reverse the decision below and remand for further proceedings consistent with its direction or in the alternative probable jurisdiction should be noted.

RESPECTFULLY:

STANLEY V. TUCKER
Petitioner

STANLEY V. TUCKER v JEAN NEAL et al

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT H-8

"This cause having come before the Court on the cross motions of the parties for Summary Judgment and the Court.... having denied the Plaintiff's motiom and granting the Defendant's motion.....

"

s/T. EMMET CLARIE

JUDGE UNITED SATES
DISTRICT COURT-
CONNECTICUT

Dated May 28th, 1974

APPENDIX "A"

STANLEY V. TUCKER v THOMAS E. MESKILL etal

RULING ON MOTIONS TO DISMISS H74-358

"..........

Accordingly the claims of the plaintiff against all the defendants are granted for failure to state a claim upon which relief can be granted.SO ORDERED.

"

Dated this 17th of April 1975

s/T. EMMET CLARIE
Chief Judge-USDC
CONNECTICUT

Note - Underline added.

APPENDIX "B"

STANLEY V. TUCKER v PAUL B. CRIKELAIR et al

JUDGMENT ON MOTION TO DISMISS H 75-310

"..........

The court ..... denying the relief requested and dismissing the complaint as to all of the defendants for failure of the plaintiff to state a claim upon which relief can be granted.

.....

"

s/ M. JOSEPH BLUMENFELD
JUDGE -UNITED STATES
DISTRICT COURT-CONN.

Dated September 20th, 1976

Note- Underline added

APPENDIX "C"

STANLEY V. TUCKER v JEAN NEAL et al

RULING ON MOTION FOR STAY No H 217

"....

Accordingly, judgment may enter denying the plaintiff's motion to remand, denying without prejudice the defendant's motion to dismiss for failure to state a claim; and granting the defendant's motion to stay all further proceedings in this action pending a resolution of the claims in H 8."

s/ T. EMMET CLARIE

UNITED STATES DISTRICT JUDGE

Dated December 7th, 1973

Note - Underline Added.

APPENDIX "D"

STANLEY V. TUCKER v JEAN NEAL, et al

RULING ON MOTIONS TO DISMISS - No H-217

"The Defendants moved to dismiss Counts two and four of the complaint ..... The Court finds that the second count which seeks damages alleging that the defendants had wrongfully and maliciously placed excessive liens on plaintiff's property is sufficient to state a valid claim for abuse of process. The court denies the motion to dismiss count two. ....."

April 19th, 1979 at Hartford

T. EMMET CLARIE

CHIEF JUDGE
USDC-Connecticut

Note - underline added

APPENDIX "E"

STANLEY V. TUCKER v JEAN NEAL, et al

MEMORANDUM OM MOTION FOR SUMMARY JUDGMENT
No H-217

"Defendant's motion for summary judgment is granted. Tucker, a man possessing of interests in valuable real property appearing pro se has had the luxury over the past six years of losing three separate lawsuits in this Court. His present action, originally filed in the state court is his fourth go at his judgment creditors.

Tucker's judgment creditors are Jean Neal, Margie J. Threlkeld, and Paul B. Crikelair. Each recovered judgments in substantial amounts against Tucker in the USDC- California. All three judgments registered in this Court pursuant to 28 USC 1963. Judgment liens for such were then filed against real property of Tucker under GS 49-44. Defendant Robert R. Anderson filed as assignee of Threlkeld and Crikelair.

Tucker lost the first lawsuit, Tucker v Neal, H 8 on May 29, 1974. His second Tucker v Meskill,et al, H 74-358 was lost on April 21, 1975 when judgment entered against him. His third, Tucker v Crikelair et al H75-310 also ended in the lost column when judgment was entered against him by order of Judge Blumenfeld on August 16, 1976 . The present lawsuit, Tucker v Neal, H 217, was filed in the Superior Court of Connecticut on October 13, 1973 and is the present case in which defendants have moved for summary judgment..... ....."

July 18, 1979 at Waterbury s/ THOMAS F MURPHY

Senior Judge USDC -

APPENDIX "F"

STANLEY V.TUCKER v JEAN NEAL et al

OPINION OF HONORABLE SECOND CIRCUIT
COURT OF APPEALS No 79-7558 (H 217)

"..... we have carefully considered all the issues which appellant Tucker has raised in this appeal. We find them to be without merit. We affirm in all respects the judgment and order of the District Court for the District of Connecticut.

s/ LEONARD P. MOORE

s/ WILLIAM H TIMBERS

Circuit Judges

s/ LLOYD F MACMAHON
United States District
Judge Sitting by
Designation

December 27th, 1979

APPENDIX "G"